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No. 83-1552

In The

Supreme Court of the United States

October Term, 1983

ROBERT C. BACON, CHARLES BUSSING, MARTHA MASINGTON, LARRY PLAGGERMAN, CLYDE A. TOWNSEND AND ALL PERSONS SIMILARLY SITUATED,

Appellants,

vs.

JOHN CARLIN, GOVERNOR OF THE STATE OF KANSAS; JACK H. BRIER, SECRETARY OF STATE, OF THE STATE OF KANSAS; ROSS O. DOYEN, PRESIDENT OF THE KANSAS SENATE; MIKE HAYDEN, SPEAKER OF THE KANSAS HOUSE OF REPRESENTATIVES; DAN THIESSEN, CHAIRMAN OF THE KANSAS SENATE COMMITTEE ON LEGISLATIVE AND CONGRESSIONAL APPORTIONMENT; AND EDGAR MOORE, CHAIRMAN OF THE KANSAS HOUSE COMMITTEE ON LEGISLATIVE AND CONGRESSIONAL APPORTIONMENT,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF KANSAS

MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Can a reapportionment plan for state legislative districts which is valid when enacted be subsequently rendered unconstitutional solely because the state legislature adopts a different system for future reapportionments?

2. Does the Equal Protection Clause of the Fourteenth Amendment compel reapportionment of state legislative districts when the existing scheme is based on state census figures only five years old and any deviations which exist are caused by comparing state census figures with those of the federal decennial census?

3. Is this matter ripe for federal intervention?

PARTIES BELOW

Appellees agree with appellants that the only parties to this proceeding are those listed in the caption of the case.

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Appellees.

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OPINION BELOW

The opinion of the federal district court is found at *Bacon, et al. v. Carlin, et al.*, 575 F.Supp. 763 (D. Kan. 1983), and is set out in Appendix A-1 of Appellants' Jurisdictional Statement.

JURISDICTION

Appellees agree with Appellants' statement of jurisdiction (at page 2 of their Jurisdictional Statement).

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Relevant constitutional and statutory provisions are set forth in Appellants' Jurisdictional Statement at pages 3-5.

———o———

STATEMENT OF THE CASE

In addition to the statement of the case set forth by Appellants at pages 6-9 of their Jurisdictional Statement, Appellees believe that the following material from the record should be considered in order to have a complete picture of the facts in this matter.

(a) The Kansas Constitution requires reapportionment of the Senate and the House of Representatives in 1979 and at every tenth year thereafter, but does *not* indicate what population figures are to be used for this purpose. (Kansas Constitution, Article 10, § 1)

(b) In 1979, as in prior years, the legislative reapportionment was performed using figures from the state agricultural census. This census, unlike the federal decennial census, excluded aliens, transients, and non-resident

military personnel stationed in Kansas. It also counted college students in the counties where their parents resided (unless the students had married or established an official residence elsewhere), unlike the federal census, which counted students as residents of the city and county where they were located on the date of the census.

(c) The population of the State of Kansas, as determined by the 1978 agricultural census, was found to be 2,359,262. When compared to the federal decennial figure which was officially certified in 1982 (2,364,236), the difference in population is 4,974, or .2%.

(d) Under the reapportionment plan adopted in 1979, an "ideal" state senate district has a population of 58,982. This differs by only 124 people from the "ideal" district using the 1980 federal census figures (59,106). [Note: Appellants are in error as to this latter figure, which is identified (at page 7) as *49*,106].

(e) Under the 1979 reapportionment plan, an "ideal" state representative district has a population of 18,874. This differs by only 40 people from the "ideal" district using the 1980 federal census figures (18,914).

(f) On March 17, 1983, the Attorney General of Kansas, Robert T. Stephan, issued an opinion (No. 83-33), in which he concluded that the existing Kansas legislative districts were based upon a valid plan of reapportionment, and that no action could or should be taken by the Kansas Legislature to reapportion before 1989. However, the opinion did note that, if the legislature chose to reapportion itself in 1989 using 1980 federal census figures, constitutional problems would arise. Accordingly, the opinion set forth several options which the legislature could take

prior to that time to avoid such problems. A copy of the opinion is attached as an appendix to this Motion.

(g) Despite Appellants' statements to the contrary in their Statement of Facts (at page 8), the opinion of the three-judge district court nowhere held that "once validly enacted a state apportionment plan was not subject to constitutional challenge for ten years." Rather, the court's decision was narrowly drawn to fit the facts of this case, with the court holding:

> "What [the cases] tell us is that in 1989, if the Kansas legislature attempts to implement its constitutional provision requiring reapportionment by reliance upon 1980 federal census figures or those figures undated by estimates, constitutional problems will arise. But what might happen in 1989 is not before us; we are reviewing a scheme enacted into law in 1979 and currently in use. The accuracy of an apportionment scheme at any given time depends as much on the age of the data as the age of the scheme. In *Beens, Flateau, Farnum,* and *Honsey* the apportionment schemes declared unconstitutional were based on census figures over ten years old. Realistically, then, those plans were not the sort of 'decennial reapportionment' schemes that the Court indicated 'would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation.' *Reynolds,* 377 U.S. at 583-84, 84 S.Ct. at 1392-93. In the instant case, on the other hand, the reapportionment scheme is only four years old and is based on census figures only five years old. We therefore conclude that Kansas is not constitutionally compelled to reapportion its legislature at this time. Accordingly, we hold for defendants." (575 F.Supp. 763, 766-67).

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ARGUMENTS AND AUTHORITIES

I. There is no Substantial Federal Question Presented

As Appellants correctly note, the three-judge panel stated (575 F.Supp. at 765) that the sole question presented by this case was a novel one, *i.e.* whether the Equal Protection Clause may compel reapportionment of state legislative districts when the existing scheme is based on census figures less than ten years old and the scheme when enacted did not contain impermissibly large deviations. The court could well have gone on to say that Appellants' argument to this effect was novel as well, in that absolutely no case law authority was found to support it. Not dissuaded by the district court's rejection of each and every one of their arguments and supporting authorities, Appellants now wish to make the same arguments, supported by the same cases, to this court. Appellants' rhetorical zeal is not matched by the substance of their case, leaving this proceeding still (as appellees earlier noted in their Reply to Appellants' Motion for Summary Judgment) a "manufactured lawsuit" which does not present a question of any federal substance.

The novel nature of Appellants' arguments, as well as the extremely narrow scope of the district court's decision, may be briefly summarized. To being with, appellants do *not* challenge the initial validity of the 1979 plan under the Equal Protection Clause, nor the use of the state agricultural census figures in constructing the plan. As the district court noted, the plan relied upon 1978 figures, the latest available, from a census of the type previously approved by Kansas courts, both state and federal. 575 F.Supp. at 766, n. 2. Although Appellants dismiss as

unimportant the differences in methodology between the state and federal census counts (since they admit the initial validity of the 1979 plan), they cannot have the matter both ways. Either the plan was void *ab initio*, as in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), or the districts so produced are valid under a legitimate state policy which uses a methodology different from, but not inferior to, that of the federal census.

If the latter, all discussion of "massive deviations" is left meaningless, for Appellants cannot compare an apple (the state reapportionment figures of 1979) with a banana (the federal figures of 1980, as modified in 1982) and then criticize the former for not being yellow or elongated. So it is with the present districts, which are based on recent figures that were arrived at by means of legitimate and constitutional means which admittedly differ from those of the federal census. *Winter v. Docking*, 373 F.Supp. 308 (D.Kan. 1974); *Meeks v. Avery*, 251 F.Supp. 245 (D. Kan. 1966). This face was recognized by the federal three-judge panel in the case below. *Bacon, supra*, 575 F.Supp. at 764.

Further, the scope of the court's decision is extremely narrow, and does not in any way create the "ten-year safe harbor" which Appellants speak of at such length. Rather, as noted above in statement of fact paragraph (g), the court looked to the relatively young age of the figures which were used in drawing the districts, and only commented that, should the 1980 figures be employed in 1989 to set up districts (which presumably would be used until 1999), constitutional problems could arise. The district court correctly held that it should not get involved in the

matter at such an early date, in that all statements by Appellants as to what would or would not happen in the future were purely speculative. To do so would violate principles of ripeness which have been established to limit the involvement of federal courts in matters which do not actually need to be decided at that time. *See, e.g., Young v. Klutznick*, 652 F.Supp. 617 (6th Cir. 1981).

This entire matter is in fact one which will not be repeated again, either in Kansas or elsewhere. While the federal census has been adopted for use in Kansas, such use will start only in 1989, per the Kansas Constitution. In point of fact, the Kansas Constitution does not specify the method by which the figures will be obtained. The Legislature chose the state agricultural census, then opted for the federal census, and can (speculatively) switch back in the future. Conversely, a constitutional amendment could be presented to Kansas voters well before 1989 to avoid the problem altogether. In light of the unknown status of the situation in 1989, Appellants' scenarios are pieces of fiction which should only be considered as accounts of what could happen, not what will inevitably occur. Like Appellants' allegations of massive deviations without any showing of racial discrimination or gerrymandering, their predictions as to what will occur in the future are unsupported.

Appellees would also note that each of the cases cited by Appellants at pages 14-16 were presented to the District Court in much the same manner, and were each specifically rejected as being non-applicable. *Whitcomb v. Chavis, supra,* involved a plan void from the outset, while *Flateau v. Anderson,* 537 F.Supp. 257 (S.D.N.Y. 1982); *Farnum v. Burns,* 548 F.Supp. 769 (D.R.I. 1982); *Honsey*

v. Donovan, 236 F.Supp. 8 (D. Minn. 1964) and *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972) (Per curiam), all involved lags between the collection of the census figures and the reapportionment which are much longer than that found here. Again, despite Appellants' strenuous efforts to create a "safe harbor" holding from this case, the text of the decision simply does not support such a result. The plan now in effect (that enacted in 1979) was found to be reasonable and constitutional by the Kansas Supreme Court [*In re Senate Bill No. 220*, 225 Kan. 628, 593 P.2d 1 (1979) and *In re House Bill No. 2620*, 595 P.2d 334 (1979)], and Appellants do not and cannot dispute these holdings. Rather, they are left with the circular argument that because problems *may* arise in 1989, the existing districts, drawn under an entirely different plan, are somehow tainted now, and should be replaced with figures which themselves are almost five years old.

II. The Question Presented Herein is Not Ripe for Federal Intervention.

Appellees would lastly argue that the entire question of Kansas legislative reapportionment is not proper for consideration by the Court at this time. As the District Court noted in its decision:

> " . . . if the Kansas legislature attempts to implement its constitutional provision requiring reapportionment by reliance upon 1980 federal census figures or those figures updated by estimates, constitutional problems will arise. But *what might happen in 1989 is not before us; we are reviewing a scheme enacted into law in 1979 and currently in use.*" 575 F.Supp. at 766 (emphasis added).

In constitutional terms, appellants do not have a case which is ripe for the intervention of the federal courts. Admittedly, a different situation will be presented should the Legislature ignore the recommendations of the Attorney General opinion issues in March of 1983 and the language of the federal district court cited above. At the present time, this is *not* a situation, as was the case in *Flateau v. Anderson, supra,* where the Legislature refuses to act on what was admittedly a present problem with apportionment.

Appellees would look to the case of *Young v. Klutznick, supra,* as an analogous case in which a reapportionment challenge was found to be premature. There, the court held:

> "Even when jurisdiction is technically present, however, the Supreme Court has recognized that '"problems of prematurity and abstractness" . . . may prevent adjudication in all but the exceptional case.' *Buckley v. Valeo,* 424 U.S. 1, 114, 96 S.Ct. 612, 680, 46 L.Ed.2d 659 (1976), *quoting Socialist Labor Party v. Gilligan,* 406 U.S. 583, 588 92 S.Ct. 1716, 32 L.Ed. 317 (1972). Such questions of ripeness, the Court has held, are resolved through two inquiries. Courts must first 'determine whether the issues tendered are appropriate for judicial resolution,' and then 'assess the hardship to the parties if judicial relief is denied at that state.' *Toilet Goods Association v. Gardner,* 387 U.S. 158, 162, 87 S.Ct. 1520, 1523, 18 L.Ed.2d 697 (1967). Plaintiff satisfy neither inquiry in this case.
>
> "The question whether tendered issues are appropriate for judicial resolution clearly 'bears close affinity' to questions of standing. *Warth v. Seldin,* 422 U.S. 490, 499 n.10, 95 S.Ct. 2197, 2205 n.10, 45 L.Ed.2d 343 (1975). The precise focus of ripeness doctrine is that it is 'peculiarly a question of timing.' *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 140, 95 S.Ct.

335, 356, 42 L.Ed.2d 320 (1974). As Justice Fortas has pointed out in the context of pre-enforcement attacks on administrative regulations, the reason for deferring consideration of abstract or premature claims is to allow governmental processes an opportunity to function—to iron out differences, to accommodate special problems. . . . The courts do not and should not pass on these complex problems in the abstract and the general—because these regulations peculiarly depend for their quality and substance upon the facts of particular situations. We should confine ourselves—as our jurisprudence dictates—to actual, specific, particularized cases and controversies, in substance as well as in technical analysis. (Citations omitted.)

• • •

"Even if the ultimate response of the legislature could be predicted with some confidence, however, the fact that it is a representative, deliberative organ of state government rather than a private party must make this Court hesitate to exercise its power so as to narrow the range of solutions it might consider. As the Supreme Court has pointed out, the reasons a governmental body might provide for its actions are important in review of those actions. *Toilet Goods Association v. Gardner,* 387 U.S. at 163, 87 S.Ct. at 1524.

"Consideration of the 'hardship to the parties' of a present denial of judicial relief also points toward a refusal to adjudicate plaintiffs' claim. The dilution of voting power on which they base their claim may not occur at all, and cannot occur until the Michigan legislature acts. That fact makes plaintiffs' claim unlike that in *Duke Power Co.,* where the Court rejected a ripeness claim because the plaintiffs would sustain immediate injury were the Court not to act. 438 U.S. at 81, 98 S.Ct. at 2634. (652 F.2d at 625-26.)"

Here, as in *Young v. Klutznick,* the harm which appellants point to does not now exist, and may not occur

at all, depending on the actions of the Kansas Legislature over the next five years. Appellants are not clairvoyant any more than Appellees or this Court, and cannot demonstrate that the horror stories of 19-year-old figures being the basis for districts will ever occur. As the district court noted, appellants' entire argument confuses what is now the basis for Kansas legislative apportionment with what could be or will be the basis in 1989. Given the political and legislative nature of the apportionment task, this Court, like the three-judge federal panel at the district court level, should refrain from intervening in a situation where the only harms shown are hypothetical and where absolutely no showing has been made that any person's right to vote has been diluted or otherwise infringed upon in an unconstitutional manner. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 749 (1973).

CONCLUSION

For the foregoing reasons, Appellees respectfully move this Court to dismiss the appeal or, in the alternative, to affirm the judgment of the United States District Court for the District of Kansas in *Bacon, et al. v. Carlin, et al.*, 575 F.Supp. 763 (1983).

Respectfully submitted,

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APPENDIX

S E A L

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March 16, 1983

ATTORNEY GENERAL OPINION NO. 83-33

The Honorable Robert V. Talkington
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Room 357-E, Statehouse
Topeka, Kansas 66612

Re: Apportionment — Reapportionment of Senatorial Districts — Constitutional Requirements

Synopsis: Pursuant to Article 10 of the Kansas Constitution, the 1979 Session of the Kansas Legislature enacted Senate Bill No. 220, which reapportioned the state senatorial districts, based on figures compiled in the 1978 state agricultural census. The reapportionment statute was presented to the supreme court by the Attorney General, with the court holding, in a final judgment, that the plan complied with the requirements of the state and federal constitutions. Accordingly, unless it is ordered to do so by a court of competent jurisdiction, the legislature may not act again on reapportionment until the time set forth by Article 10, which is 1989.

Reapportionment on a decennial basis, such as that provided by the Kansas Constitution, has been held consistent with equal protection rights under the federal constitution. Additionally, court decisions have sanctioned the use of fig-

ures derived from the state agricultural census, rather than the United States census, and have found no discrimination in the way the state census considered persons in military service in arriving at population figures for each district. Accordingly, the fact that U.S. census figures collected subsequent to 1979 are dissimilar from those used by the legislature and approved by the supreme court is insufficient to challenge the validity of the apportionment plan currently in effect. However, given that the state agricultural census has been replaced by the federal census, the next reapportionment scheduled for 1989 will of necessity use data collected in 1980, yet will draw districts which will be used until 1999. As population shifts during this lengthy period may give rise to equal protection concerns the legislature may wish to consider remedial measures prior to 1989, such as amending the Kansas Constitution, Article 10, or reinstituting some form of state census. Cited herein: K.S.A. 11-201, 24-3402, 24-3403, L. 1979, ch. 55, 1983 SR No. 1814, 1979 SB No. 220, Kan. Const., Art. 10, §1, U.S. Const., Amend. XIV.

* * *

Dear Senator Talkington:

As Majority Leader of the Kansas State Senate, you have requested our opinion on several inter-related questions concerning the possible reapportionment of that body. Your request was prompted by 1983 Senate Resolution No. 1814, which directs the Senate Committee on Legislative and Congressional Apportionment to review the population of each district in light of the state and federal constitutions, and to determine whether a denial of the Equal Protection Clause of the 14th Amendment to the United States Constitution would occur if reapportion-

ment is delayed until 1989, as is currently contemplated. You inquire whether any conflict exists between the current system of apportionment and the equal protection clause, and whether there is anything which the Legislature can do to remedy any such conflicts.

The current senatorial districts were drawn in 1979, and represented the first use of Article 10, Section 1 of the Kansas Constitution as amended in 1974. Pursuant to the section's requirements, 1979 Senate Bill No. 220 was presented by this office to the state supreme court for a determination of its validity. The court reviewed the plan and entered a judgment approving it in full, which judgment is final as provided by Article 10, Section 1(e). *In re Senate Bill No. 220,* 225 Kan. 628 (1979). Among other things, the court found that the population deviations contained in the new districts were acceptable (the maximum spread between districts was 6.5%), and that the use of census figures collected by the Kansas State Board of Agriculture was acceptable. In making this latter determination, the court noted that it was following earlier decisions which had been rendered by the federal district court for this state. *Winter v. Docking,* 373 F. Supp. 308 (D. Kan. 1974). The districts so approved were used in the 1980 elections for the senate.

It is our understanding that the recent senate resolution was prompted by figures derived from the 1980 United States census, which differ, in some cases considerably, from the figures used in determining the districts in 1979, *i.e.*, the 1978 state agricultural census totals. The three districts in Shawnee County are 12.6% below the population for an "ideal" district, which is 59,106. Similar deficiencies are found in several districts located in the west-

ern portion of the state. On the other hand, several districts in the eastern section of Kansas, such as the four districts in Johnson County, are above the ideal figure by as much as 9.6%. The most extreme anomaly, however, is the 22nd District, encompassing parts of Riley and Geary Counties, which exceeds the ideal total by 43.6%. In actual numbers, this district has 84,869 people, more than 25,000 in excess of the population for the ideal district.

In that the 22nd District presents a situation which is entirely dissimilar from the other 39 districts, it would be in order to discuss it separately later in this opinion. Prior to doing so, the initial question which you raise concerning the authority of the legislature to act should be examined, so as to determine whether any legislative action is constitutionally permissible. As noted above, Article 10 of the Kansas Constitution was followed in the drawing of the current districts. Therein, Section 1 provides in pertinent part:

> "(a) *At its regular session in 1979, and at its regular session every tenth year thereafter, the legislature shall enact a statute reapportioning the state senatorial districts* and representative districts. Bills reapportioning legislative districts shall be published in the official state paper immediately upon final passage and shall be effective for the next following election of legislators and thereafter until again reapportioned.
>
> "(b) Within fifteen days after the publication of an act reapportioning the legislative districts within the time specified in (a), the attorney general shall petition the supreme court of the state to determine the validity thereof. The supreme court, within thirty

days from the filing of the petition, shall enter its judgment. . . .

. . . .

"(e) *A judgment of the supreme court of the state determining a reapportionment to be valid shall be final until the legislative districts are again reapportioned in accordance herewith.*" (Emphasis added.)

By the plain language of the above, it is clear that the legislature, having acted in accordance with the constitution in 1979, is without the authority to act again until 1989, which is the tenth year after the initial reapportionment under the above-quoted language. In our judgment, any attempt by the legislature to reapportion senatorial districts on its own motion would be in direct contravention of the Kansas Constitution, and in our opinion would be struck down by the supreme court as unconstitutional. In addition, any bill enacted by the legislature prior to 1989 would be in conflict with the final judgment of the supreme court rendered in 1979. Only through a change in the constitution could the legislature act prior to 1989.

This conclusion has direct support in Kansas case law. In *Harris v. Shanahan,* 192 Kan. 183 (1963), the court was faced with 1963 Senate Bill No. 440, which, although stipulated to by all parties as providing equal representation, contained a serious technical flaw (the city of Leawood was disenfranchised). The court stated as follows (at 192 Kan. 190-191):

"It is the general rule that once a valid apportionment law is enacted no future act may be passed by the legislature until after the next regular apportionment period prescribed by the Constitution. (Jones v. Freeman, 193 Okl. 554, 146 P.2d 564; *Denney, Clerk,*

et al., v. The State, ex rel., Basler, 144 Ind. 503, 42 N. E. 929; *The People v. Hutchinson,* 172 Ill. 486, 50 N. E. 599; *Parker, et al. v. The State, ex rel. Powell,* 133 Ind. 178, 32 N.E. 836, 33 N.E. 119; *People ex rel. Henderson v. Supervisors,* 147 N.Y. 1, 41 N.E. 563; *Harmison v. Ballot Com'rs,* 45 W. Va. 179, 31 S.E. 394; 18 Am.Jur., Elections, §14, p. 190.) The apportionment period provided in the Constitution does not, of course, require that the act be passed at a regular session, but a special session may be called for that purpose. (*The State ex rel. Attorney General vs. Cunningham,* 81 Wis. 440, 51 N.W. 724; 18 Am.Jur., Elections, §14, p. 190.)

"The existing apportionment of the house of representatives was enacted in 1961 and that of the senate in 1963. *Thus, both being current in terms of time within the meaning of Article 10, Section 2, those acts are not subject to change by the legislature until the next constitutional apportionment period unless held to be invalid.* Since there is a presumption that laws passed by the legislature are valid and constitutional until judicially determined to be otherwise, the legislature will be powerless to lawfully reapportion until the next apportionment period, unless this court adjudges the present senate apportionment act to be invalid." (Emphasis added.)

After finding no acceptable way to read the omitted city back into the bill, the court threw out the entire measure.

Accordingly, while the legislature may not act on its own motion to reapportion the senatorial districts until 1989, it of course may be ordered to do so by the state supreme court or the federal district court, as has occurred numerous times in the past. *See, e.g.,* cases cited at 225 Kan. 634, 635. Since the plan was deemed to be constitutionally sound when enacted, it may now be found defective only because the passage of time and the occurrence of events

have rendered it unacceptable, or because of an inherent defect in the entire system used in Kansas for the reapportionment of such districts. In our opinion, a review of the facts and the case law precedents does not support either of the above grounds.

We would initially note that, while the figures used in drawing up the current districts and those presented by the federal census (a table of which you attached to your request) do differ in every district, the differences in most cases are slight. Indeed, the ideal district under the current plan is 59,000, or only 106 persons less than that presented by the federal census figures, which were compiled two years later. Furthermore, to the extent that such variances from the ideal figure have developed, they are probably due to population shifts or differences in counting, not action taken by the legislature which is subject to scrutiny for constitutional defects.

It is also pertinent to note that, with the exception of the 22nd District, the deviations between the two sets of census figures are within the range approved by other decisions in the area of reapportionment, given the valid state interest in preserving existing political subdivisions. *See, e.g., Winter v. Docking, supra,* 373 F.Supp. at 309-310 (11.6% variance from ideal), *Harris v. Anderson,* 196 Kan. 450, 453 (1966) (11% variance from ideal), *Yancey v. Faubus,* 251 F.Supp. 998 (1965) (15% variance from mean average), *Mahan v. Howell,* 410 U.S. 415, 35 L.Ed.2d 320 (1972) (16.4% total variance between largest and smallest districts). As the courts are so fond of saying, mathematical exactness is not required, even in the absence of a state interest. *White v. Regester,* 412 U.S. 755, 37 L.Ed.2d 314 (1973). Where a state interest is present,

fairly large differences have been tolerated. *Wyche v. Madison Parish Policy Jury,* 635 F.2d 1158 (5th Cir. 1981).

It is additionally our opinion that the Kansas Constitution is not subject to attack on the grounds that reapportionment will not occur again until 1989. The validity of reapportionment on a decennial interval was discussed and approved by the United States Supreme Court in the landmark case of *Reynolds v. Sims,* 377 U.S. 533, 12 L.Ed. 2d 506 (1964), wherein the court stated:

> "That the Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis does not mean that States cannot adopt some reasonable plan for periodic revision of their apportionment schemes. Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. . . . Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period. . . .
>
> "In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation." 12 L.Ed.2d at 539-540.

However, even if subsequent population shifts since 1979 are insufficient to call the plan into question, it is possible

that inherent flaws may have been present at the outset which would result in the same finding. Specifically, this would arguably be the case for District 22, which is the one district where the state agricultural census figures differ widely from those of the federal census taken two years later. However, it is our opinion that the variance, while real, reflects a difference in the purpose for which the figures were gathered, and does not invalidate the 1979 reapportionment on equal protection grounds. The Supreme Court has held that states are not required to use the federal census for apportionment purposes, and has recognized that the use of other types of enumerations will give different, yet permissible, results. *Burns v. Richardson*, 384 U.S. 73, 16 L.Ed.2d 376 (1966).

A number of background facts about the 22nd District can be obtained from material contained in prior court files and decisions. As established by the final decree of the federal district court in *Anderson v. Docking*, Case No. W-3220, the district contained the city of Junction City and the townships of Milford and Smoky Hill in Geary County, and the city of Manhattan and the townships of Madison, Grant, Wildcat, Ogden, Manhattan, Ashland and Zeandale in Riley County. This left the district with a population which by 1978 had reached 60,444 (using the agricultural census), or only 2.5% over the ideal figure. Given this, only minimal changes were made by 1979 Senate Bill No. 220, which shifted two and one-half townships in Riley County to the district on the east (the 21st), which needed more people.

As it is currently constituted, the district contains Junction City, Manhattan and the territory between the two cities, including the Fort Riley Military Reservation.

While the residents of the post were included in the 1980 federal census, they were for the most part not counted by the state in its annual agricultural census, including the 1978 census from which the 1979 districts were derived. Only those inhabitants who had registered to vote, or who had taken other affirmative steps to establish residency, were counted. This fact was noted by the federal district court in *Winter v. Docking, supra* at 310-11, which rejected arguments that the agricultural census discriminated against military personnel. The court noted that Kansas statutes in fact treat persons living in federal enclaves on the same basis as Kansas residents for purposes of registering to vote. K.S.A. 25-3402, 25-3403.

The principle of "one man, one vote," first applied in *Baker v. Carr,* 369 U.S. 186, 7 L.Ed.2d 663 (1962), is predicated upon the concept that one elector's voice should have the same weight as another's, within practical limits. Unless a person living within a federal enclave has taken steps to become a resident of Kansas, whether by registering to vote or otherwise, he or she has no connection with the political affairs of this state. The situation presented here is not like that in *Evans v. Cornman,* 398 U.S. 419, 26 L.Ed.2d 370 (1970), where residents of a federal enclave were ***not permitted*** to vote in Maryland, nor are members of the military being discriminated against because of the nature of their employment. *Davis v. Mann,* 377 U.S. 678, 12 L.Ed.2d 609 (1964). While it is theoretically possible that the 25,000 persons not reflected on the 1978 state agricultural census have since registered to vote, it is enough for the state to demonstrate a rational basis for its procedures. In considering such cases, courts have placed on plaintiffs the burden of showing that a

particular class has reduced opportunity to participate in the electoral process, and are so disenfranchised. *Clark v. Marengo City*, 469 F.Supp. 1150 (S.D.Ala. 1979). The exclusion from the census of non-registered military personnel has already been challenged in Kansas, and the state's procedures upheld. *Winter v. Docking, supra.*

Having examined each of the above challenges to the current plan used to apportion the population of Kansas for senatorial districts, it is our opinion that none rise to a level which results in a denial of equal protection under the law. Hence, in our opinion, no basis exists for court-ordered reapportionment at this time. However, given the timing of the next regularly scheduled reapportionment (1989), and the abolition of the state agricultural census, we feel constrained to note a likely grounds for challenge in the future.

In that the agricultural census was abolished in 1979 (L. 1978, ch. 55), with the federal census now used for all purposes (K.S.A. 11-201), the 1989 session of the legislature will be required to utilize the 1980 federal census figures, with the resulting districts based on such number until 1999, or nearly 20 years later. Such a result would be extremely vulnerable to an equal protection attack, which could end in yet another court-mandated reapportionment.

The existence of this potential problem was recognized during the 1979 hearings on Senate Bill No. 220 and its companion measure reapportioning the house of representatives. (Minutes of House Committee on Legislative, Judicial and Congressional Reapportionment, January 8, 1979.) As yet, we are aware of no steps which have been

proposed to correct the situation, which of necessity would involve either amending Article 10 or reinstituting some form of state census. In contrast to undertaking actual reapportionment now, the legislature is fully capable of studying these or other solutions and then taking action.

In conclusion, pursuant to Article 10 of the Kansas Constitution, the 1979 Session of the Kansas Legislature enacted Senate Bill No. 220, which reapportioned the state senatorial districts, based on figures compiled in the 1978 state agricultural census. The reapportionment statute was presented to the supreme court by the Office of the Attorney General, with the court holding, in a final judgment, that the plan compiled with the requirements of the state and federal constitutions. Accordingly, unless it is ordered to do so by a court of competent jurisdiction, the legislature may not act again on reapportionment until the time set forth by Article 10, which is 1989.

Reapportionment on a decennial basis, such as that provided by the Kansas Constitution, has been held consistent with equal protection rights under the federal constitution. Additionally, court decisions have sanctioned the use of figures derived from the state agricultural census, rather than the United States census, and have found no discrimination in the way the state census considered persons in military service in arriving at population figures for each district. Accordingly, the fact that U.S. census figures collected subsequent to 1979 are dissimilar from those used by the legislature and approved by the supreme court is insufficient to challenge the validity of the apportionment plan currently in effect. However, given that the state agricultural census has been replaced by the federal census, the next reapportionment scheduled for

1989 will of necessity use data collected in 1980, yet will draw districts which will be used until 1999. As population shifts during this lengthy period may give rise to equal protection concerns, the legislature may wish to consider remedial measures prior to 1989, such as amending the Kansas Constitution, Article 10, or reinstituting some form of state census.

Very truly yours,

/s/ Robert T. Stephan
Attorney General of Kansas

/s/ Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:hle

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